BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA L. GARMANY	)	
Claimant	)	
VS.	)	
	)	
CASEY'S GENERAL STORES	)	Docket No. 1,064,778
Respondent	)	
AND	)	
	)	
EMCASCO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the August 14, 2013, Order For Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Gary E. Laughlin, of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated July 23, 2013; the August 9, 2013, Independent Medical Evaluation report of Dr. Harold Hess; the transcript of the February 15, 2013, discovery deposition of claimant, and all associated pleadings.

ISSUES

The ALJ found claimant suffered accidental injury arising out of and in the course of her employment with respondent and that her work accident was the prevailing factor in causing the medical condition, need for treatment and disability.

Respondent requests review of whether the ALJ erred in finding claimant's accidental injury arose out of and in the course of her employment and her accident was the prevailing factor in causing the medical condition, need for treatment and disability. Respondent requests the ALJ's order be reversed, arguing the mere act of standing up

from a squatting position constituted an act of daily living or a neutral risk. In addition, respondent suggests that the ALJ's reliance on a medical opinion by a physician who had not proven a diagnosis is insufficient to support a finding that claimant's work activity was the prevailing factor causing her injury, medical condition and need for treatment. Respondent goes one step further, suggesting at one point in its brief that it:

> struggles with the concept that claimant even suffered a work accident. As . . . claimant was simply standing up from a squatting position and there was no trauma or work risk involved. Be that as it may, and assuming for argument purposes only that an accident occurred, claimant has failed to meet her burden of proving that the work accident was the prevailing factor in causing her injury, medical condition and need for treatment."[1]

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In March, 2012, claimant was working for Casey's General Store in Scranton, Kansas as assistant manager. Claimant was on duty the evening of March 30, 2012, and was supposed to be running the register that evening, but an employee on the clean-up crew called in sick. Claimant attempted to call in another employee for the clean-up crew, but was unable to find anybody. She called the store manager who came in at around 8 p.m. to cover the register and claimant went to do the clean-up work, part of which was stocking the walk-in cooler.

From inside the walk-in cooler, claimant straightened up bottles on the top shelf and then began consolidating 20-ounce bottles of soda from one half-empty case to another half-empty case on the lower shelf. Claimant was squatted down with her knees bent while consolidating bottles on the lower shelf. As she stood up, she heard and felt a pop in her back and felt pain in her lower back. Claimant had nothing in her hands when she stood up. She left the cooler, notified her manager and filed an incident report.

Thinking she may have pulled a muscle in her back, claimant waited a while to see if it would heal on its own. When she wasn't getting any better, claimant went to see her primary care physician, Dr. James D. Seeman, on April 17, 2012. Dr. Seeman took five x-rays of the lumbosacral spine and scheduled claimant for an MRI of her lumbar spine. Dr. Seeman also prescribed a muscle relaxant and pain medicine. Dr. Seeman's notes reflect that the x-rays did not show any intervertebral disk space issues, but did reveal what

[1] Respondent Brief at 7 (filed Aug. 29, 2013).

he believed to be a pars defect at the sixth lumbar vertebra. His assessment was that there was no significant degenerative disease and no definitive disk disease. In addition to the pars defect, claimant showed some slight curvature of the spine, which Dr. Seeman believed might be more due to muscle spasms than an actual structural abnormality.

Claimant's lumbar spine MRI without contrast was performed on April 17, 2012. It showed degeneration of lumbar intervertebral discs, most marked at L4-L5 and L5-S1, with minimal central disc bulging at the L5-S1 level, minimally compressing the epidural fat and thecal sac at that level. No disc protrusion or spinal stenosis at the other lumbar levels was seen. No lumbar compression fractures were seen.

On April 19, 2012, Dr. Seeman's nurse placed a follow-up call to claimant to check on her progress. Claimant advised that she was no better and the prescribed pain medication was not alleviating her pain. On April 25, 2012, respondent gave claimant authorization for a pain management consultation and treatment.

Following two epidural injections in May/June, with only moderate pain relief, claimant was again seen by Dr. Seeman on July 9, 2012. As a result, Dr. Seeman scheduled claimant for a consultation with board certified orthopedic surgeon, Michael L. Smith, M.D.

On July 20, 2012, claimant was examined by Dr. Smith. He took x-rays of her back. Dr. Smith's notes revealed that claimant's radiographs showed some scoliosis across the lumbar segments, a *spina bifida occulta* at L5 and possibly a spondylolysis at L5. Dr. Smith recommended work conditioning and scheduled an EMG. On August 1, 2012, claimant began physical therapy at Salt Creek Fitness and Rehabilitation in Osage City, Kansas. Claimant's August 2, 2012, EMG showed no significant lumbosacral radiculopathy, plexopathy, entrapment neuropathy, peripheral neuropathy and was within normal limits bilaterally.

On August 2, 2012, claimant called Dr. Seeman's office requesting a pain medication prescription. Claimant indicated she was starting physical therapy for her back and needed pain relief to get through the physical therapy. Dr. Seeman prescribed Lortab. Claimant had physical therapy weekdays at Salt Creek Fitness and Rehabilitation starting August 1, 2012 and ending August 21, 2012.

A CT scan on September 14, 2012, revealed mild levoscoliosis of the thoracolumbar spine, bilateral spondylolysis at L5 without significant spondylolisthesis, mild annular disc bulging at L4-L5 and L5-S1 and no evidence of acute fracture.

Claimant's Lortab prescription was refilled on September 17, 2012. On September 25, 2012, claimant called Dr. Seeman, requesting a stronger pain reliever, noting she just learned she had two fractured discs and advising that Dr. Smith was "going

to do surgery next month after getting it cleared through workmans comp."[2] Dr. Seeman declined to prescribe a stronger pain medication at that time, but did refill the Lortab on September 27, 2012.

By letter dated October 3, 2012, Dr. Smith replied to a request from respondent's third party administrator for a diagnosis of claimant's condition. In his letter, Dr. Smith opines that claimant's work incident was not the prevailing factor in the spondylolysis at L5 shown on a CT study dated September 14, 2012. Dr. Smith indicated that he believed claimant's spondylolysis at L5 predated her March 30, 2012, work incident.

On November 8, 2012, claimant was again seen by Dr. Seeman. His notes reflect concern over Dr. Smith's view that claimant's injury was due to a prior existing condition. On November 26, 2012, Dr. Seeman prescribed claimant Percocet for pain. On December 27, 2012, claimant was prescribed the muscle relaxant cyclobenzaprine and her Percocet was replaced with a prescription for an increased dose of Lortab.

On April 23, 2013, at the request of claimant's attorney, Dr. Peter V. Bieri, M.D. performed an examination of claimant after considering claimant's provided history and the provided medical documentation. At that time, no x-rays were available for Dr. Bieri's review. After reviewing claimant's documentation and performing a clinical examination, Dr. Bieri noted that radiographic findings revealed changes at two levels with a diagnosis rendered consistent with spondylolysis at two levels. Dr. Bieri opined that "[w]hile the claimant may have had some element of pre-existing degenerative change of the lumbar spine, the injury in question, with the mechanism of injury specifically requiring work activity, is considered to be the prevailing factor for the diagnosis rendered."[3] Utilizing the AMA *Guides* to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Bieri rated claimant with a seven percent whole person impairment for specific disorders of the lumbar spine and a four percent whole person impairment for range of motion deficits of the lumbar spine, resulting in a combined whole person impairment of eleven percent.

In a July 22, 2013, letter to respondent's attorney, Dr. Smith stated that he believed claimant's work accident "is not the prevailing factor for her lumbar spondylolysis, nor would it be for any surgery or disability related to that condition."[4]

Following the ALJ's July 23, 2013, Preliminary Hearing, the ALJ, by order dated July 23, 2013, referred claimant for an Independent Medical Evaluation to Dr. Harold Hess of Johnson County Spine in Overland Park, Kansas. Following his office consultation with claimant, Dr. Hess noted that claimant's MRI scan showed L4-L5 and L5-S1 degenerative

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[2] P.H. Trans., Cl. Ex. 1 at 19 (Dr. Seeman's Sept. 25, 2012, phone note).

[3] P.H. Trans., Cl. Ex. 1 at 5 (Dr. Bieri's Apr. 23, 2013, IME report).

[4] P.H. Trans., Resp. Ex. A.

disc disease and that her CT scan showed a bilateral L5 spondylolysis without spondylolisthesis and with an incomplete posterior arch of L5. Dr. Hess' impression was probable lumbar discogenic pain. Dr. Hess hypothesized that when claimant stood up from a squatting position "on or around March [30], 2012", she "most likely produced an annular tear, leading to" her present condition. Dr. Hess opined that the work-related event when claimant was in the walk-in cooler was the prevailing factor in her current medical condition and symptoms. Although Dr. Hess couches this pronouncement in the familiar and reassuring nomenclature of "reasonable degree of medical certainty", his recommendations for further treatment acknowledge that his diagnosis cannot be confirmed in the absence of additional testing, through a lumbar discogram of L3-L4, L4-L5, and L5-S1 with CT to follow. Nonetheless, the Order generating this appeal assigned greater credibility to this diagnosis and prevailing factor finding than the medical opinions reaching a different conclusion.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or

> precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The undersigned Board Member disagrees with the ALJ that claimant has satisfied her burden of proof that the accidental injury she sustained arose out of and in the course of her employment and that the claimant's accident was the prevailing factor causing claimant's injury, medical condition and disability. As a preliminary matter, it should be noted that the independent medical evaluation upon which the ALJ relied for his conclusions is based upon speculation by Dr. Hess that claimant suffered an annular tear which lead to lumbar discogenic pain. As stated previously, without performing a lumbar discogram, this diagnosis by Dr. Hess cannot be confirmed. Because his causative diagnosis is based on speculation that claimant's symptoms are the result of an annular tear, it is an insufficient basis upon which to conclude that the March 30, 2012 cooler

incident was the prevailing factor in causing claimant's medical condition, need for treatment and disability.[5]

As noted above, Kansas' workers compensation law provides that:

> "[i]f in any employment to which the workers compensation act applies, an employee suffers personal injury by accident . . . arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act."[6]

Setting aside for the moment whether claimant's injury was the result of an accident as that term is defined by the Act, this decision will first examine whether claimant suffered an injury "arising out of . . . employment" and "in the course of employment". Those terms define whether an injury is compensable under the law and are not synonymous; each have distinct meanings and both must exist before recovery is allowed.[7]

Addressing these conjunctive requirements in reverse order, an injury occurs "in the course of" employment if it happens while the employee is at work in the employer's service.[8] Upon engaging in the act of standing from a squatting position while at work, claimant heard and felt a pop in her back and experienced pain. It is clear that claimant's back injury occurred, at least in the sense that it became symptomatic, while claimant was at work in the employer's service and respondent does not dispute this.

The statutory provision's remaining conjunctive requirement, that to be compensable a claimant's injury by accident must "arise out of employment", is a reference to the origin or cause of the accident.[9] To arise out of employment requires a showing of a causal connection between the accidental injury and the conditions under which the work is required to be performed.[10]

In the instant matter, claimant asserts her injury was "undoubtedly caused by accidental injury arising out of and in the course of her employment and that such accident

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[5] See *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 460-461, 263 P.3d 821 (2011), *rev. denied* (2012).

[6] K.S.A. 2011 Supp. 44-501b(b).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Rinke v. Bank of America*, 282 Kan. 746, 752, 148 P.3d 553 (2005).

[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P.2d 837 (1984).

[10] *Bach v. National Beef Packing Co.*, No. 107,681 (Kansas Court of Appeals Unpublished opinion filed December 21, 2012).

was the prevailing factor in causing claimant's need for medical treatment and her resulting disability."[11] This Board Member, in part, disagrees.

An injury occurring at work is not compensable under workers compensation unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[12] Further, "[a]n injury is compensable only if, *inter alia*, the 'employment exposes the worker to an increased risk of injury of the type actually sustained.' [Citation omitted.]"[13]

In *Johnson*, the claimant injured her left knee when she turned in her chair and attempted to stand while reaching for a file overhead. A medical examination showed a bucket handle meniscal tear to the knee and surgery followed. Both the ALJ and the Board ruled that the claimant's injury arose out of employment. In reversing the Board's decision, the Kansas Court of Appeals noted that the language of the Act "shows that injuries caused by or aggravated by the strain or physical exertion of work do not arise out of employment if the strain or physical exertion in question is a normal activity of day-to-day living."[14] Likewise in the instant matter, it is the conclusion of this Board Member that the strain or physical exertion in which claimant engaged when she returned to a standing position from a squatting position is a normal activity of daily living. Nothing in the record establishes or even suggests that the work duties or working conditions in her employment with respondent exposed claimant to an increased risk of injury of the type she actually sustained. Claimant's work did not require strenuous exertion, nor expose her to an abnormal or awkward position; she arose to stand from a position low to the ground, neither holding nor carrying any tools or merchandise. Upon doing so, she experienced the symptoms she described, having rendered symptomatic her bilateral spondylolysis at L5. The mere fact that her preexisting condition was rendered symptomatic while she was at work does not mean that it arose out of the employment

Further, the Act provides that the words "arising out of and in the course of employment" shall not be construed to include accident or injury which arose out of a risk personal to the worker.[15] In the instant matter, it appears claimant's injury arose from a condition, specifically a bilateral spondylolysis at L5, which constituted a risk personal to the employee.

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[11] Claimant's Brief at 1-2 (filed Sept. 16, 2013).

[12] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 789, 147 P.3d 1091 (2006).

[13] *Id.*

[14] *Id.* at 790.

[15] K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii).

Although the statutory regimes of certain jurisdictions treat as compensable work-place accidents that aggravate, accelerate or render symptomatic a preexisting condition, in much the same way as previous Kansas law did, the 2011 Amendments to Kansas' workers compensation law make it clear that current Kansas law does not. Under the revised law, "[a]n injury is not compensable because work was a triggering or precipitating factor . . . [nor] solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."[16] By its very nature, spondylolysis is a preexisting condition, a congenital or developmental defect or anomaly. Kansas law, as amended in 2011, precludes treating as compensable an injury merely because it renders a preexisting condition, such as spondylolysis, symptomatic.

An injury arises out of employment within the meaning of the law when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is performed and the resulting injury.[17] In *Bryant*, the claimant was working as a service technician when, on a service call, he stooped over to grab a tool out of his tool bag, and when he twisted back to work on the equipment, he felt a "pop" or "snap." The claimant in *Bryant* had earlier suffered a back injury while jumping from a boat onto a dock. This resulted in an injury leading to a lumbar spine diskectomy. The *Bryant* Court acknowledged there was no bright-line test for what constitutes a work-injury and stated the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. The Court stated "The right to compensation benefits depends on one simple test: Was there a work-connected injury?"[18]

The Court found *Bryant* was not engaged in the normal activities of day-to-day living when he reached for his tool belt or when he bent down to carry out a welding task.[19] Here, the claimant was not engaged in an activity connected to or inherent in the performance of her job. She was not lifting anything, nor was she reaching for anything while standing. She was simply standing up.

Based upon the above, this Board Member finds that the ALJ erred in finding that claimant's accidental injury arose out of and in the course of her employment and that claimant's work accident was the prevailing factor in causing the medical condition, need for treatment and disability.

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[16] K.S.A. 2011 Supp. 44-508(f)(2).

[17] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 592, 257 P.3d 255 (2011).

[18] *Id* at 595.

[19] *Id.* at 596.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[20] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[21]

CONCLUSION

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant has failed to prove that she suffered personal injury by accident which arose out of her employment with respondent and that her work accident was the prevailing factor in causing her medical condition, need for treatment and disability.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated August 14, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[20] K.S.A. 2011 Supp. 44-534a.

[21] K.S.A. 2012 Supp. 44-555c(k).